COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS	**BOARD NO. 029167-01**
Laura Pinsonnault	Employee
Conso International	Employer
Zurich Insurance Company	Insurer

REVIEWING BOARD DECISION
(Judges McCarthy, Carroll and Levine)

APPEARANCES
Karen Catuogno, Esq., for the employee
Henry E. Bratcher, III, Esq., for the insurer

MCCARTHY, J. The insurer appeals an administrative judge's award of ongoing § 34 temporary total incapacity benefits, making a number of arguments. We address the most significant, and summarily affirm the decision as to the others. The insurer contends that its due process rights and relevant regulations were violated when the administrative judge, at conference, in the absence of a motion by a party or an opportunity to be heard, amended the claim against it to include a new injury and then issued an order based on the new injury. Next, the insurer maintains that the judge should not have allowed the employee to withdraw her appeal against the prior insurer. Third, Zurich argues that the judge erred in awarding § 34 benefits where the employer made a bona fide job offer which the impartial doctor opined the employee could perform. Finally, the insurer briefly argues that the judge's decision lacks specificity with regard to the injuries for which it is liable. We find merit in the last two arguments, and recommit the case for further findings on those issues. We affirm the decision as to the other issues.

Laura Pinsonnault, age 60, began working for the employer in 1996 running fourteen knitting machines. Her job required her to continuously use her hands to tie threads together as one spool ran out and had to be joined to a new spool. She began to

notice pain in her hands and sought medical treatment then. In 1998 she continued to work, but the pain became severe in her hands. In February 2001, she fell at work, hitting her left hand hard. (Dec. 2.)

Carpal tunnel surgery was suggested for both hands, one hand at a time. On May 14, 2000, the employee had surgery on her right hand, which was giving her the most pain. On the advice of her employer, she went out on short-term disability. On July 3, 2000, she returned to light duty work, doing no lifting, but still performing repetitive tasks. After two months, she returned to her former job running fourteen knitting machines. Her left hand became more painful, and soon her right hand also caused her pain again. Id.

In August 2001, she had surgery on her left hand. She has been out of work since that time. According to the employee, her symptoms got much worse after the surgery, including burning pains shooting up her arm and sharp pains in her fingers. Further surgery, which she wants to have, has been recommended for her left hand. Since she uses her right hand for most activities, it is still somewhat painful. Id.

The administrative judge's decision contains none of the procedural history, so we look to the Board file[1] and the briefs of the parties for it. The employee originally filed two claims. The first was against Fire and Indemnity Insurance Company ("Fire") for weekly and medical benefits, for an injury date of April 8, 1998. The alleged injury was bilateral carpal tunnel syndrome. (Insurer brief 2; Employee brief 1.) At the same time, she filed a claim against Zurich, the insurer here, for medical benefits only for epicondylitis and tendonitis of the left elbow as a result of a fall at work on February 2, 2001. (Insurer brief 2; Employee brief 1; Claim form against Zurich dated August 10, 2001.)[2]

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[1] See Rizzo v. M.B.T.A., 16 Mass. Workers' Comp. Rep. 160, 161 n.3 (2002)(reviewing board may take judicial notice of documents in the board file).

[2] The decision contains no information as to when Zurich came on the risk as the employer's insurer. However, Zurich did not raise below, nor does it argue here, that it was not liable as of the date of the original claim against it, February 2, 2001, or for any period during which the employee worked after that. Therefore, we will not make an issue of that omission from the

After separate conciliations, the two claims were scheduled for conference at the same time. (Insurer brief 2; Employee brief 2.) Following the conference, the administrative judge issued an order against Zurich "subject to Section 15A," requiring it to pay weekly § 34 benefits beginning on August 27, 2001 for the "left elbow and left carpal tunnel issue." The order mentioned that the attorney's fee was reduced because the judge had awarded a reduced fee on a companion case, but contained no information on what the order in the companion case was.[3] (Order of Payment § 34 filed December 17, 2001.) Zurich filed a motion for reconsideration of the conference order, arguing that there had been no motion to amend the "medicals only" claim for the elbow filed against it to include a claim for a carpal tunnel injury. The insurer contended in its motion that due process and the regulations limited the issues at conference to the elbow, and if a new claim were added, the insurer had forty-five days to prepare a defense. (Motion for Reconsideration dated December 21, 2001.) The judge denied the motion. (Letter from judge dated January 8, 2002.) On February 27, 2002, approximately two months after the conference, the employee filed a motion to amend her claim against Zurich by adding a claim for weekly benefits. The judge did not act on this motion. (Employee's Motion to Amend Claim.)

A month later, on March 27, 2002, Dr. Eugene Leibowitz examined the employee pursuant to § 11A. (Statutory Exh. 1.) The insurer deposed Dr. Leibowitz on December 4, 2002. The case was scheduled for hearing on September 26, 2002, along with the employee's claim against the first insurer, Fire. (Employee brief 3.) At that time, Fire and the employee withdrew their appeals of the conference order, so that the only

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decision either. Dunlevy v. Tewskbury Hosp., 17 Mass. Workers' Comp. Rep. 70, 75 (2003)(issue waived if not raised below). See also 452 Code Mass. Regs. § 1.15(4)(a)3 (reviewing board need not decide questions or issues not argued in the brief). That being said, it would be the better practice to include such information in the decision. Since the case is being recommitted, the judge will have the opportunity to clarify this matter.

[3] The employee states that the judge also issued a conference order against Fire for the closed period of disability and medical benefits associated with the right carpal tunnel surgery performed in May of 2000. (Employee brief 2.)

pending appeal was Zurich's. (Employee brief 3; Insurer brief 3; Letter of September 27, 2002 withdrawing employee's appeal of conference order against Zurich.) The hearing on Zurich's appeal went forward on October 21, 2002. (Dec. 1.)

In his decision, the judge found that Dr. Leibowitz opined, in his report and deposition testimony that:

> [A]s a result of her work activities, Ms. Pinsonnault suffers from bilateral carpal tunnel syndrome and has the possibility of a left ulnar neuropathy and tendonitis. The operations done to her hands were reasonable, necessary and related to her work activities. As a result she is partially disabled. She should not use her left hand. She should not use her right hand for pounding.
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> He recommends that Ms. Pinsonnault have further EMG tests to her left hand to determine what further treatment, including the possibility of surgery, might be needed.

(Dec. 4; citations omitted.)

The judge concluded that, as a result of symptoms caused by her work activity, the employee had severe restrictions on the use of her hands. After hearing the testimony of the employer's Director of Human Resources, (Tr. 100), the judge found that the employee could not perform the light duty job offered by the employer. (Dec. 4.) He also found her request for further surgery reasonable. (Dec. 5.) Accordingly, he ordered the insurer to pay ongoing § 34 benefits beginning on August 27, 2001, the date she left work.

We first address the insurer's argument that its due process rights were violated when the judge, in effect, amended the claim against it at *conference* to include a left carpal tunnel injury and then ordered it to pay for the incapacity resulting from that injury. It is well-settled that due process applies to *hearings* before the Board. Haley's Case, 356 Mass. 667 (1972). The parties are:

> [E]ntitled to a hearing at which they have an opportunity to present evidence, to examine their own witnesses and to cross-examine witnesses of other parties, to know what evidence is presented against them and to an opportunity to rebut such evidence, and to argue, in person or through counsel, on the issues of fact and law involved in the hearing.

Id. at 681. Most recently, the Supreme Judicial Court has stated that, where a party is denied "an opportunity to present testimony necessary to present fairly the medical issues, there then might well be a failure of due process . . . ." O'Brien's Case, 424 Mass. 16, 23 (1996). We have found no cases, and the insurer has cited none, which accord the parties constitutional due process rights at conference. The cases cited by the insurer involved instances where the insurer was not aware of a new claim until after the hearing and thus was not afforded the opportunity to present evidence at *hearing*. See Morini v. Wood Ventures, Inc., 17 Mass. Workers' Comp. Rep. 426, 431 (2003)(where judge allowed employee's motion to join § 34A claim nine months after the record closed, insurer's due process rights to present evidence were violated); Casagrande v. Massachusetts Gen. Hosp., 15 Mass. Workers' Comp. Rep. 383, 386 (2001)(where judge allowed joinder of § 34A claim seven months after hearing, insurer's due process right to present further medical, and possibly, lay evidence violated).

Here, no such failure of due process occurred, as the insurer was well aware of the claims it was to defend against long before hearing. The judge, in his order of December 17, 2001, indicated that Zurich was responsible for the left elbow and left carpal tunnel issue. By letter of January 8, 2002, he denied the insurer's motion for reconsideration of his order. The insurer was thus clearly put on notice that it was responsible for defending against this new injury. The impartial examination was not held until March 27, 2002, three months after the conference. The insurer, thus, had ample time to request to forward medical records to the impartial examiner or to set up an examination by a physician of its choice under § 45. The insurer has not indicated that it sought either of these options. Instead, it chose to argue at hearing that it was responsible for defending only against the original claim for medical benefits for the left elbow, despite admitting that the judge had made it clear at conference that the insurer was to defend against the carpal tunnel claim as well.[4] (Tr. 4-12.) Nevertheless, insurer counsel did question the employee at length about her past history, medical treatment and pain involving her

[4] The following colloquy occurred at the start of the hearing:

hands and wrists, as well as her repetitive job duties alleged to have caused her carpal tunnel condition. (Tr. 47-80.) In addition, the insurer put on two witnesses whom it examined as to the modified job offered to the employee. (Tr.100-106, 117-119, 132-133.) Though the insurer tried unsuccessfully to put documents into evidence in support of its position that it was responsible only for the left elbow claim, it did not at that point, or subsequently, request a continuance so that it could have adequate opportunity to prepare for the hearing, which was held approximately ten months after the conference.[5]

After hearing, the insurer exercised its right to depose the impartial physician on December 4, 2002. At the deposition, the insurer questioned Dr. Leibowitz at length about the employee's carpal tunnel syndrome, including its causes and the restrictions he would impose as a result. Insurer counsel also questioned the impartial examiner about a number of medical records he had reviewed, and asked him to opine on the employee's ability to perform the modified duty job the employer had offered, based on examining

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Mr. Bratcher: The issue is that the insurer is putting forward, that, again, that the only claim that was ever b[r]ought, that they ever had notice of was a medical only for a [sic] elbow. And it's the only claim that's been brought as far as I can see.

Judge: I know we had a dispute about that with you at conference. But at conference it was made clear of what the whole scope was, correct?

Mr. Bratcher: At the conference there were two insurance companies. One was Zurich which was here for the medical only claim for the elbow. And the other was I believe I think it's Royal. They are called Fire and Casualty. And the Fire and Casualty claim was here on the carpal tunnel claim.

Judge: I remember at conference you were arguing here as to the other claim. I did suggest that you were here on all of them at that point.

Mr. Bratcher: Correct.

(Tr. 5.)

[5] In fact, the employee's brief indicates that the case had been scheduled for hearing, along with the companion case, approximately a month earlier, but did not go forward due to the absence of the insurer's counsel. (Employee brief 3; see letter from insurer counsel to judge dated September 26, 2002.)

the rings she would be required to count and the box into which she would have to put them. (Dep. 5-41.) The insurer did not request that additional medical evidence be admitted on the basis of inadequacy or complexity either before or after the deposition. G. L. c. 152, § 11A(2); see O'Brien's Case, supra at 22. Based on all these factors, we cannot conclude that the insurer has been denied the "opportunity to be heard and to have considered the merits of [its] contentions." Id. at 24.

The insurer argues, however, that the applicable regulation, 452 Code Mass. Regs. § 1.23, was violated in that the claim was never formally amended to include the carpal tunnel injury, nor was the insurer given additional time to prepare a defense. That regulation provides, in relevant part:

> (1) A party may amend his claim or complaint as to time, place, cause, or nature of the injury, as a matter of right, at any time prior to a conference on a form provided by the Department. At the time of a conference or thereafter, a party may amend such claim or complaint only by filing a motion to amend with an administrative judge. Such a motion shall be allowed by the administrative judge unless the amendment would unduly prejudice the opposing party.
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> . . . .
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> (3) No amendment to a claim or complaint may be made except as provided by M.G.L. c. 152 and 452 C.M.R. 1.00. Any party shall be allowed a reasonable period of time to prepare a defense to an amended claim or complaint. Such period shall not exceed 45 calendar days from the date of notice of the amendment, unless an administrative judge finds that additional time to prepare a defense is needed.

The employee acknowledges that no written motion to amend the claim was filed at conference, but contends that the defect was cured by its motion filed after the conference. (Employee brief 10.) While it would have been preferable for the judge to rule on the motion, we think that his order at conference made his intention to amend the claim clear. In addition, we see no error in the judge sua sponte amending the claim in the absence of a formal motion to amend before him at the time of conference. In Utica Mut. Ins. Co. v. Liberty Mut. Ins. Co., 19 Mass. App. Ct. 262 (1985), the court held:

> *There is nothing in c. 152 which prevents the board from joining a third party against whom a claim has not been made by an employee but whose presence is necessary to dispose completely of the claim.* Section 5 of c. 152 allows the board

> considerable latitude in "mak[ing] rules consistent with . . . chapter [152] for carrying out its provisions." The board is not bound by strict legal precedent or legal technicalities, but, rather, governed by the practice in equity. The term "in equity" is consonant with the liberal construction to be given to c. 152 and has been "applied to supply a remedy [even] where there [may be] a gap in the statute." Moreover, G.L. c. 152, § 5, directs that the board's "[p]rocess and procedure shall be as simple and summary as reasonably may be." Although the "problem of [impleader] rarely arises in practice," we conclude that *the board may join, by any means reasonably calculated to give notice and a right to be heard, any other insurer or insurers it deems necessary for the expeditious and complete disposition of a controversy* like the present one.

Id. at 267-268. (Citations omitted; emphasis added.)

The insurer also argues that it was prejudiced by not being given additional time to prepare a defense at conference. "Except as to amendments to claims or complaints which are a matter of right prior to a § 10A conference, pursuant to 452 Code Mass. Regs. § 1.23(1), when considering a motion to amend, the judge must make a determination as to whether such amendment would unduly prejudice the opposing party." Morini, supra at 430. As in Morini, there is no finding in the decision as to lack of prejudice. However, contrary to our decision in Morini where we declined to infer lack of prejudice, we make that inference here based on the wording of the conference order itself clearly holding the insurer liable for the left carpal tunnel injury, the judge's denial of the insurer's Motion for Reconsideration, and the discussion at hearing making clear the issues to be tried, as well as the other factors discussed above in support of the holding that the insurer's due process rights were not violated. While it would have been better practice for the judge to have given the insurer additional time to prepare a defense at conference (see 452 Code Mass. Regs. § 1.23(3)), we do not find that omission fatal in this case, given the opportunities the insurer had subsequent to conference to develop and present evidence.

In Debrosky v. Oxford Manor Nursing Home, 11 Mass. Workers' Comp. Rep. 243 (1997), we held that the original claim was deemed amended as tried by consent where, despite insurer's objection to evidence relating to later claim of injury not formally made, it was obvious the insurer was prepared at hearing to defend against the claim. The

doctor at deposition testified regarding the later injury date not formally claimed, and the insurer at hearing countered the employee's testimony of a later incident with rebuttal witnesses. Similarly, here the insurer was aware as of the conference that the judge had deemed the claim amended, and was prepared at hearing and at deposition to defend against it. To the extent it chose thereafter to simply protest that it had not been given ample notice or opportunity to defend against the carpal tunnel injury because the claim had not been formally amended, it did so at its peril. See also G. L. c. 152, § 49.[6]

The insurer also argues that the employee should not have been allowed to withdraw her original claim for the carpal tunnel injuries against Fire, but instead the hearing should have gone forward with both insurers. It cites Borstel's Case, 307 Mass. 24, 27 (1940), in support of its argument. However, Borstel's Case is not applicable in the situation where the *employee*, prior to hearing, withdraws an appeal against one of two insurers in the case. The rationale in that case was to protect the employee from having to appeal an award with which he was satisfied in order to avoid the consequences of being left without a remedy if he lost against the appealing insurer. In Borstel's Case, the second insurer, which had been found not liable by the reviewing board, alleged that the appeal of the first insurer to Superior Court did not involve the second insurer in the appellate process. The court reasoned:

> Usually it is of no concern to an employee whether he gets paid by one insurer or the other. Yet under the practice for which the later insurer now contends, an employee would have to claim a review against the insurer absolved by the single member, lest he lose his rights against both insurers. Such a practice, instead of being "as simple and summary as reasonably may be" would be technical and confusing. . . .[C]laims against successive insurers for compensation for a single disability are treated as constituting a single proceeding. The claim for review by the earlier insurer brought both insurers before the reviewing board.

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[6] That section provides, in relevant part:

> A claim for compensation shall not be held invalid or insufficient by reason of any inaccuracy in stating the date, place, cause or nature of the injury, unless it is shown that it was the intention to mislead and that the insurer was in fact misled thereby.

Id. at 26-27. (Citations omitted.) Subsequent cases have reversed a *judge's* dismissal of one insurer. See, e.g., Sylvia's Case, 313 Mass. 313 (1943); Blanco's Case, 308 Mass. 574 (1941). Where the employee objects to the release of one insurer, we have found error in the judge's allowance of a motion to dismiss it. Scotti v. Honeywell/Loral Infrared & Imaging Sys., 11 Mass. Workers' Comp. Rep. 333 (1997). However, there is no error where the employee herself withdraws an appeal against an insurer. As the employee points out, there is no prejudice to the remaining insurer; it is free to argue that it is not liable for the injury in question. The risk is on the employee that the judge would find Zurich not liable, and the employee has chosen to accept that risk. (Employee brief 11.)

We agree with the insurer, however, that the case must be recommitted because the judge erred in basing his finding of total incapacity on physical restrictions not imposed by the impartial physician. We recommit the case to the judge for further findings on whether the job is a "particular suitable" job under § 35D(3), and, if so, whether the employee can do it.

The opinion of the impartial physician, as the only medical evidence in this case, is entitled to prima facie weight on medical issues, " 'which include the doctor's description of the employee's physical ability to perform certain tasks, as well as restrictions the examiner would place on the employee's physical ability to work.' " Hicks v. Commonwealth Registry of Nurses, 17 Mass. Workers' Comp. Rep. 375, 377 (2003), quoting Gauthier v. AC Lumber Co., 12 Mass. Workers' Comp. Rep. 120, 122 (1998), citing Scheffler's Case, 419 Mass. 251, 257 (1994). It is not prima facie evidence, however, that the employee is qualified to perform the job offered by the employer. See Joseph v. City of Fall River, 16 Mass. Workers' Comp. Rep. 261, 264 (2002), citing Scheffler's Case, supra ("Any vocational determination, provided by an impartial expert, is of no prima facie consequence").[7]

[7] Compare G. L. c. 152, § 35D, which provides, in relevant part:

Here, Dr. Leibowitz opined that the employee should not use her left hand at all, but could use her right hand, except for pounding. (Dec. 4; Dep. 15-16, 23-24, 55.) The job offered by the employer involved counting small plastic rings and placing them in a small box, and specified that it would not require the use of her left hand. (Ins. Exh. 3.) The impartial physician opined that the employee should be able to perform the job offered by the employer using her right hand only on a full-time basis.[8] (Dec. 4; Dep. 40-41; 59.) The judge was required to give prima facie weight to Dr. Leibowitz' opinion that the employee had no limitations in the use of her right hand, except as to pounding. (See Dep. 15.) The judge's finding of total incapacity is not based on the doctor's prohibition of the use of the employee's left hand,[9] or in his specific restriction as to pounding for the right hand. Instead, the judge relied on testimony that the employee would need to use her wrist in a repetitive fashion to perform the job, an activity the impartial had not prohibited as to the right hand:

> For purposes of sections thirty-four, thirty-four A and thirty-five, the weekly wage the employee is capable of earning, if any, after the injury, shall be the greatest of the following:--
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> . . . .
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> (3) The earnings the employee is capable of earning in a particular suitable job; provided, however, that such job has been made available to the employee and he is capable of performing it. The employee's receipt of a written report that a specific suitable job is available to him together with a written report from the *treating physician* that the employee is capable of performing such job shall be *prima facie evidence of an earnings capability* under this clause.

(Emphasis added.)

[8] The judge found that "the doctor suggests Ms. Pinsonnault *might* be able to do a job described in this way (Dep. pp. 40-41)," (Dec. 4) (emphasis added), but the impartial physician's testimony was expressed with more certainty. When a hypothetical was posed to him describing the job, he stated that "She should be able to do that." (Dep. 40). He further opined, "I think she should be able to do that full-time, seven and a half hours." Id. Later in the deposition, he again stated, referring to the employment described to him above, "I would think she could do that using her right hand." (Dep. 59.)

[9] We note that there was testimony from the employer representative, Edward Dembinski, from which the judge could have inferred that the job could not be done efficiently with one hand. (Tr. 110-111.)

> Edward Dembinski described the light duty ring job as one where you would not have to use your wrist to do the job, but did state that it is a very repetitive job. He also said there are speed standards set for the job, which includes opening and closing lids and counting out the ring[s], as well as placing the light boxes into larger containers. While ideally someone would not have to bend their wrists to do the job, and the doctor suggests Ms. Pinsonnault might be able to do a job described in this way[,] I am persuaded from the description of the job that it is a *type of repetitive job in which the wrist is going to [be] used* by people doing it, as it would make all parts of it faster and easier.

(Dec. 4.) (Emphasis added.)

The employee argues that the judge acted within his authority in finding that she could not perform the job offered because he found her complaints of pain credible. (Employee br. 12.) Though it is true that the judge found that "[h]er right hand also still gives her some pain," (Dec. 3), he did not indicate that he factored her pain into his determination that she could not perform the job offered. (See Dec. 4.) Contrast Reynolds v. Kay Bee Toys, 16 Mass. Workers' Comp. Rep. 433, 438 (2002)(judge concluded partial medical disability equated to total incapacity based on the employee's physical restrictions as well as her pain).

The judge's conclusion that the employee cannot perform the modified job offered by the employer does not accord the impartial opinion the proper prima facie weight as to the medical restrictions imposed by Dr. Leibowitz. Therefore, we reverse the judge's finding on this issue, and recommit the case to the judge for further findings as to whether the job offered is a "particular suitable" job under § 35D(3) which Ms. Pinsonnault is capable of performing.

One further point warrants mention. The insurer argues briefly that the judge's finding of a work injury is not specific enough to support the award against Zurich, and that the judge never specified for which body parts (right wrist, left wrist, and/or left elbow) the order is intended. (Insurer brief 10, 13.) We think that the impartial opinion that the employee's repetitive work activity amounted to a cumulative injury, (Dep. 51-53), supported the judge's finding that "as a result of her work activity, [Ms.] Pinsonnault suffers from symptoms in her hands that place severe restrictions on their use," and that

"[h]er wish to undergo further surgery to see if the condition can be improved is reasonable." (Dec. 5.) However, the better practice would be for the judge to explicitly analyze liability for the injuries under the successive insurer rule, making clear the date or dates of injury, the nature of injury or injuries, and the dates for which the insurer is on the risk.[10] On recommittal, he should do so.

The decision is reversed as to the award of total incapacity, and the case recommitted to the administrative judge for further findings consistent with this opinion. As to all other arguments raised by the insurer, we summarily affirm the decision.

So ordered.

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William A. McCarthy
Administrative Law Judge

Filed: ***June 23, 2004***

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Martine Carroll
Administrative Law Judge

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Frederick E. Levine
Administrative Law Judge

[10] Under the successive insurer rule, where there have been several compensable injuries during successive periods of coverage of different insurers, the insurer at the time of the most recent injury bearing a causal relationship to the incapacity carries the burden of compensation. Taylor v. Morton Hosp. & Med. Ctr., Inc., 16 Mass. Workers' Comp. Rep. 30, 35 (2002). Moreover, "[a] work injury is compensable so long as it contributes, 'even to the slightest extent,' to the employee's resultant incapacity." Id. at 35, quoting Rock's Case, 323 Mass. 428, 429 (1948). The insurer has not challenged the applicability of the successive insurer rule to this case, but instead has maintained that the medical evidence does not causally relate the February 2, 2001 elbow injury to the need for carpal tunnel surgery on either wrist. (Insurer brief 7, 10.) See also footnote 2, infra.